

(1)

Supreme Court U.S.
FILED

28 16 94 APR 17 1996

No. 95 -

Office of the Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,

Petitioners,

v.

JOHN DOE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

James E. Holst
James Nellis Odell
Patrick J. O'Hern
**OFFICE OF THE GENERAL
COUNSEL, UNIVERSITY
OF CALIFORNIA**
300 Lakeside Drive
Oakland, CA 94612-3565

Charles A. Miller*
John F. Duffy
Caroline M. Brown
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioners

April 17, 1996

*Counsel of Record

QUESTION PRESENTED

Whether an entity, which otherwise would be considered part of the State or an "arm of the State" and thereby immune from suit in federal court under the Eleventh Amendment, may lose its immunity where it has a claim for reimbursement or indemnity from the federal government or other third party.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS AND RULE 29.6 STATEMENT

The petitioners in this case are The Regents of the University of California and John Nuckolls, a University official sued in his capacity as Director of the Lawrence Livermore National Laboratory. Petitioners were defendants in the District Court and appellees in the Court of Appeals.

Dr. John Doe, Ph.D., on behalf of himself and all others similarly situated, was the plaintiff in the District Court and the appellee in the Court of Appeals. (The plaintiff's motion for class certification remains pending in District Court. *See App.* at 18a.)

In the Court of Appeals, the "Lawrence Livermore National Laboratory" was named by respondent Doe as an appellee, but he correctly recognized in his briefs to the Court of Appeals that the Laboratory is not a legal entity but only a physical facility owned by the United States Department of Energy and managed by the University. No entity denominated the "Lawrence Livermore National Laboratory" was represented on briefs in the Court of Appeals, and the Laboratory was not otherwise a "party" to the proceeding below separate and distinct from petitioners the University and Nuckolls.

A number of federal officials were originally named as defendants in the District Court, but they were dismissed pursuant to stipulation and were not parties in the Court of Appeals. There were no other parties in the Court of Appeals.

The Regents of the University of California is a corporation authorized by Article IX, Section 9(a) of the California constitution. It has no parent and no subsidiary companies.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
A. Introduction and Summary	2
B. Factual Background	3
C. Proceedings Below	5
REASONS FOR GRANTING THE PETITION	9
A. The Circuits Are Split On Whether Eleventh Amendment Immunity Turns On The Legal Liability Of A State Entity Or On A Prediction Of The Likely Financial Impact Of A Particular Judgment.	9

TABLE OF AUTHORITIES

Page	Page(s)
B. The Issue Presented Here Is Important Because The Position Adopted By the Majority Below Significantly Infringes Upon State Sovereign Immunity and Imposes Heavy Practical Burdens.	21
1. The Inconsistency With This Court's Decisions.	21
2. The Practical Implications of the Ruling Below.	26
CONCLUSION	30
CASES	
<i>Atascadero State Hospital v. Scanlon</i> , 473 U.S. 234 (1985)	10, 22, 26
<i>BV Engineering v. U.C.L.A.</i> , 858 F.2d 1394 (9th Cir. 1988), <i>cert. denied</i> , 489 U.S. 1090 (1989)	7
<i>Bennett v. White</i> , 865 F.2d 1395 (3d Cir.), <i>cert. denied</i> , 492 U.S. 920 (1989)	14, 15
<i>Brown v. Porcher</i> , 660 F.2d 1001 (4th Cir.), <i>cert. denied</i> , 459 U.S. 1150 (1981)	12, 13, 14, 29
<i>Cannon v. University of Health Sciences</i> , 710 F.2d 351 (7th Cir. 1983)	10, 11, 12, 16
<i>Colbeth v. Wilson</i> , 554 F. Supp. 539 (D. Vt. 1982), <i>aff'd</i> , 707 F.2d 57 (2d Cir. 1983) (per curiam)	16
<i>Cotton v. Mansour</i> , 863 F.2d 1241 (6th Cir. 1988)	16
<i>County Department of Public Welfare v. Stanton</i> , 545 F. Supp. 239 (N.D. Ind. 1982)	20

Page(s)	Page(s)		
<i>Cronen v. Texas Department of Human Services</i> , 977 F.2d 934 (5th Cir. 1992)	18	<i>Hamilton v. Regents of the University of California</i> , 293 U.S. 245 (1934)	3
<i>Doucette v. Ives</i> , 947 F.2d 21 (1st Cir. 1991)	16, 28	<i>Harrington v. Blum</i> , 483 F. Supp. 1015 (S.D.N.Y. 1979), <i>aff'd without op.</i> , 639 F.2d 768 (2d Cir. 1980)	20
<i>Dunlop v. Minnesota</i> , 626 F. Supp. 1127 (D. Minn. 1986)	20	<i>Hess v. Port Authority Trans-Hudson Corp.</i> , 115 S. Ct. 394 (1994)	23, 24
<i>Edelman v. Jordan</i> , 415 U.S. 651 (1974)	18, 24	<i>In re Bacon</i> , 49 Cal. Rptr. 322 (Cal. Ct. App. 1966)	3, 4
<i>Esparsa v. Valdez</i> , 862 F.2d 788 (10th Cir. 1988)	10, 13, 19	<i>In re Royer's Estate</i> , 56 P. 461 (Cal. 1899)	3
<i>Ex parte Young</i> , 209 U.S. 123 (1908)	24	<i>In re San Juan Dupont Plaza Hotel Fire Litigation</i> , 888 F.2d 940 (1st Cir. 1989)	17, 18
<i>Fernandez v. Chardon</i> , 681 F.2d 42 (1st Cir. 1982), <i>aff'd on other grounds sub nom., Chardon v. Fumero Soto</i> , 462 U.S. 650 (1983)	15	<i>Ishimatsu v. Regents of the University of California</i> , 72 Cal. Rptr. 756 (Cal. Ct. App. 1968)	3
<i>Florida Department of Health & Rehabilitation Services v. Florida Nursing Home Association</i> , 450 U.S. 147 (1981)	15, 18, 22	<i>Jordan v. Weaver</i> , 472 F.2d 985 (7th Cir. 1973)	18
<i>Foggs v. Block</i> , 722 F.2d 933 (1st Cir. 1983), <i>rev'd on other grounds sub nom., Atkins v. Parker</i> , 472 U.S. 115 (1985)	15, 16, 18	<i>Kroll v. Board of Trustees of University of Illinois</i> , 934 F.2d 904 (7th Cir. 1991)	11, 12
		<i>Lake Country Estates, Inc. v. Tahoe Regional Planning Agency</i> , 440 U.S. 391 (1979)	23

Page(s)	Page(s)
<i>Lujan v. Regents of University of California</i> , 69 F.3d 1511, 1522-23 (10th Cir. 1995)	14
<i>Markowitz v. United States</i> , 650 F.2d 205 (9th Cir. 1981)	17, 18
<i>Mascheroni v. Board of Regents of University of California</i> , 28 F.3d 1554 (10th Cir. 1994)	9, 10, 19
<i>McGuire v. Switzer</i> , 734 F. Supp. 99 (S.D.N.Y. 1990)	20
<i>Papasan v. Allain</i> , 478 U.S. 265 (1986)	24, 25
<i>Paschal v. Didrickson</i> , 502 U.S. 1081 (1992)	9, 10, 12, 15
<i>Paschal v. Jackson</i> , 936 F.2d 940 (7th Cir. 1991), <i>cert. denied</i> , 502 U.S. 1081 (1992)	12, 13, 28
<i>Penington v. Bonelli</i> , 59 P.2d 448 (Cal. Dist. Ct. App. 1936)	3
<i>Pennhurst State School & Hospital v. Halderman</i> , 465 U.S. 89 (1984)	22, 23, 24, 25, 26
<i>Pennsylvania v. Union Gas Co.</i> , 491 U.S. 1 (1989)	26
<i>Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.</i> , 506 U.S. 139 (1993)	22, 23, 28
<i>Ramirez v. Puerto Rico Fire Service</i> , 715 F.2d 694 (1st Cir. 1983)	17
<i>Regents of the University of California v. City of Santa Monica</i> , 143 Cal. Rptr. 276 (Cal. Ct. App. 1978)	3
<i>Robinson v. Block</i> , 869 F.2d 202 (3d Cir. 1989)	15
<i>Seminole Tribe of Florida v. Florida</i> , 116 S. Ct. ____ (March 27, 1996)	22, 23, 26
<i>Temple University v. White</i> , 729 F. Supp. 1093 (E.D. Pa. 1990)	20
<i>Thompson v. City of Los Angeles</i> , 885 F.2d 1439 (9th Cir. 1989)	7
<i>Vaughn v. Regents of the University of California</i> , 504 F. Supp. 1349 (E.D. Cal. 1981)	4
<i>Will v. Michigan Department of State Police</i> , 491 U.S. 58 (1989)	6, 7, 8

Page(s)

CONSTITUTIONAL AND STATUTORY PROVISIONS	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	5
28 U.S.C. § 1332	5
42 U.S.C. § 1983	5, 10
Cal. Const. art. IX §, 9(a)	3
Cal. Const. art. XVI, § 8(a)	3
Cal. Educ. Code § 92439 (West 1989)	3
Cal. Educ. Code § 92443 (West 1989)	3
U.S. Const. amend. XI	<i>passim</i>

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95 -

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA, *et al.*,

Petitioners,

v. —

JOHN DOE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, The Regents of the University of California (the "University") and John Nuckolls, a University official, hereby petition this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix ("App.") at 1a - 14a) is reported at 65 F.3d 771. The memorandum opinions and orders of the United States District Court for the Northern District of California (App. at 15a - 33a) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 11, 1995. A petition for rehearing was denied on January 19, 1996. App. at 34a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

STATEMENT OF THE CASE

A. Introduction and Summary.

This case involves a contract action brought by Respondent Doe against the Petitioner University. The suit arises out of the University's activities in managing Lawrence Livermore National Laboratory, a federally-owned facility that the University operates pursuant to a contract with the United States Department of Energy ("DOE"). Doe alleges that the University breached a contract with him when it withdrew an offer for employment at the Laboratory after Doe had accepted the offer. The District Court dismissed Doe's action against the University on the grounds that the University was an instrumentality of the State of California, and that therefore the suit was barred by the Eleventh Amendment. The Ninth Circuit reversed. It held that the University was not entitled to be considered a State instrumentality

"in this specific instance" because the agreement between the federal government and the University concerning the operation of the Laboratory obligates the federal government to indemnify the University for any liability arising out of the University's management of the Laboratory. App. at 2a, 10a.

B. Factual Background.

Under Article IX, Section 9(a) of the California constitution, The Regents of the University of California is a corporation composed of 18 members appointed by the Governor with the consent of the State Senate, and seven ex officio members including, *inter alia*, the Governor, the Lieutenant Governor, and the Speaker of the State Assembly. The University is viewed under State law as "a constitutionally created arm of the state," *Regents of the University of California v. City of Santa Monica*, 143 Cal. Rptr. 276, 279 (Cal. Ct. App. 1978), "a branch of the state itself," *Penington v. Bonelli*, 59 P.2d 448, 450 (Cal. Dist. Ct. App. 1936), "a statewide administrative agency," *Ishimatsu v. Regents of the University of California*, 72 Cal. Rptr. 756, 763 (Cal. Ct. App. 1968), and "a branch of government equal and coordinate with the Legislature, the judiciary, and the executive." App. at 7a (quoting 30 Op. Cal. Att'y Gen. 162, 166 (1957)). See also *Hamilton v. Regents of the University of California*, 293 U.S. 245, 257 (1934) (holding that the University "is a constitutional department or function of the state government").

The administration of the University is designated a "public trust" under the Article IX, § 9(a) of the State constitution. Public support of the University "[f]rom all state revenues" is constitutionally required to be a "first" priority of the Legislature. Cal. Const. art. XVI, § 8(a). The University is authorized to exercise the power of eminent domain, Cal. Educ. Code § 92439 (West 1989), and is exempt from both local taxation, *id.* § 92443, and local regulation, *Regents of the University of California v. City of Santa Monica*, 143 Cal. Rptr. at 279-80. Under California law, "[a]ll of [the University's] property is property of the state." *In re Royer's Estate*, 56 P. 461, 463 (Cal. 1899); see also *In re*

Bacon, 49 Cal. Rptr. 322, 329 (Cal. Ct. App. 1966) (same); *Vaughn v. Regents of the University of California*, 504 F. Supp. 1349, 1354 (E.D. Cal. 1981).

The Lawrence Livermore National Laboratory is a federal facility owned by the United States Department of Energy.^{1/} The facility is managed and operated by the University pursuant to a contract with the DOE. Under the contract, the University handles all employment matters at the Laboratory, but the DOE retains control over the issuance of security clearances for Laboratory employees. App. at 3a.

The contract provides that, subject to a number of qualifications, the DOE shall indemnify and hold the University harmless for any loss, judgment or liability "arising out of or connected with the work [under the contract]." App. at 36a (University-DOE Contract, Art. XVII, cl. 4(b)). The contractual qualifications to DOE's obligation cover circumstances where the loss (1) is caused by "bad faith or willful misconduct," (2) "would ultimately be an unallowable cost under the provisions of [the] contract," or (3) "results from a contractual commitment which when incurred exceed[s] the funds then obligated to the contract." *Id.* Furthermore, DOE's obligation to indemnify is expressly limited by "the availability of funds appropriated from time to time by Congress." *Id.* at 37a (Contract, Art. XVII, cl. 4(d)).

Respondent Doe is a mathematical physicist who received his Ph.D. from Harvard University in 1981. He alleges that, in mid-June of 1991, he accepted an offer from the University for employment at the Lawrence Livermore National Laboratory. Doe further alleges that shortly thereafter, the University attempted to withdraw the offer of employment on the grounds

that he would be unable to obtain the proper security clearance from the DOE.

C. Proceedings Below.

Doe filed this action on June 19, 1992, in the United States District Court for the Northern District of California. On February 5, 1993, the District Court issued a preliminary ruling dismissing certain of the claims against some of the defendants named in Doe's original and first amended complaints.^{2/}

On April 7, 1993, Doe filed a second amended complaint containing two claims. The first claim was against the University for breach of an employment contract, and federal jurisdiction was premised on diversity of citizenship, 28 U.S.C. § 1332. The second claim was a claim under 42 U.S.C. § 1983 against the University and Petitioner Nuckolls for allegedly depriving Doe of his rights under federal security clearance regulations, which Doe claims were violated when allegedly "unqualified" personnel at the Laboratory "determined" his eligibility for a security clearance without regard to the procedures set forth in the regulations. See App. at 4a. Jurisdiction over that claim was based on an asserted federal question, 28 U.S.C. § 1331. The two claims in Doe's second amended complaint define the current scope of the litigation.^{3/} For relief, Doe requested (*inter alia*) money damages under the alleged employment contract in an amount exceeding \$100,000 (the claimed amount of back pay is much higher at this time) and an order of specific performance requiring the

^{1/} Respondent originally named the Lawrence Livermore National Laboratory as a defendant entity in this suit but, on appeal, he correctly recognized that the Laboratory is not a legal entity but only a physical facility owned by the DOE. Appellant Br. at 5 n.2.

^{2/} Doe also originally named as defendants the DOE, James Watkins (then the Secretary of Energy), and Richard Clayton (then the Assistant Secretary of Energy for Defense Programs). In November of 1992, however, Doe agreed to a stipulation by which all the federal defendants were dismissed from the case with prejudice.

^{3/} Doe's second amended complaint also requested that the District Court certify a class on behalf of all others similarly situated. The District Court did not act on the class certification request. See App. at 18a.

University to hire Doe as a physicist according to the terms of the alleged employment contract.

On May 10, 1993, the University moved to dismiss all claims in Doe's second amended complaint, and the District Court granted the motion in all relevant respects on June 24, 1993. The Court held that the University was an "arm of the State" for purposes of the Eleventh Amendment, and that Doe was therefore barred from pursuing the breach of contract claim in federal court. App. at 24a.

The Court also dismissed the Section 1983 claim against the University and against Petitioner Nuckolls in his official capacity as Director of the Laboratory. *Id.* at 22a - 24a. The Court noted that, under *Will v. Michigan Department of State Police*, 491 U.S. 58, 70-71 (1989), governmental entities considered "arms of the state" for Eleventh Amendment purposes, and officials of such entities (when sued in their official capacity), are not considered "persons" within the meaning of the Section 1983, and are thus not subject to Section 1983 liability. App. at 22a - 23a. Accordingly, the Section 1983 claims against the University and Petitioner Nuckolls in his official capacity were dismissed. *Id.* at 25a. The District Court entered a final, appealable judgment on September 13, 1993, *id.* at 15a, from which Doe filed a timely appeal to the Ninth Circuit.

A divided panel of the Ninth Circuit reversed. The majority employed a five-factor test to determine "whether the University, acting in a managerial capacity for the Laboratory, is an arm of the state and thus entitled to Eleventh Amendment immunity from suit in federal court." *Id.* at 6a. The Court considered:

- [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property

in its own name or only the name of the state, and [5] the corporate status of the entity.

Id. at 6a-7a (quoting *ITSI TV Prods. v. Agricultural Ass'n*s, 3 F.3d 1289, 1292 (9th Cir. 1993)) (citations omitted).

The Ninth Circuit had previously ruled that the University was entitled to Eleventh Amendment immunity, *see Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989), *BV Engineering v. Univ. of Calif., Los Angeles*, 858 F.2d 1394, 1395 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989), and application of the last four of the five factors, which depend on the general structure and function of the University, were unchanged since these prior rulings. The Court, however, distinguished its prior authority on the basis of the first factor. The majority ruled that application of the first factor depended on the "source of funding in each situation," App. at 9a, and thus the University could be an arm of the State in some of its capacities, but not in others, *see id.* The majority determined that the first factor weighed against recognizing Eleventh Amendment immunity because the University-DOE "Contract makes clear that the [DOE], and not the State of California, is liable for any judgment rendered against the University in its performance of the Contract." *Id.* at 7a.

On that basis, the Court held that the University, in its capacity as manager of the Laboratory, was not an arm of the State for purposes of the Eleventh Amendment. App. at 10a. Because the University was not considered part of the State, it was subject to the Court's diversity jurisdiction on Doe's contract claim. Also, for the same reason, neither it nor its officials were protected by the rule in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), and, accordingly, were subject to suit under Section 1983.

Judge Canby dissented. In his view, the prior case law establishing that the University was a State instrumentality (*Thompson, supra*; *BV Engineering, supra*) should have been

controlling, and the Court should not "reassess the status of the University in the absence of a change in its structure." App. at 11a-12a.

Judge Canby recognized that the majority's decision turned on the first factor of its five-part test, *see id.* at 11a, but in his view that "factor must be viewed as a legal, not an economic matter." *Id.* at 13a. To Judge Canby, the crucial issue was whether the State treasury is legally obligated and, he noted, "[n]o one has disputed that a judgment against the University of California is a legal obligation of the State of California." *Id.* Accordingly, Judge Canby argued that the University's contractual right to seek indemnity from the United States should be irrelevant to the analysis:

A judgment in this case will be a legal liability of the State of California. The fact that California has a legal means of collecting an indemnity from the United States does not affect its primary liability for the judgment. Doe, if he wins his case, must execute his judgment against the State, not the United States.

Id. On that basis, Judge Canby concluded that the University should be considered part of the State for purposes of the Eleventh Amendment, and that the University's officials would therefore also be immune from Section 1983 official capacity suits under the rule in *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989).

The University and Petitioner Nuckolls filed a petition for rehearing and a suggestion for rehearing *en banc*, both of which were denied by the Ninth Circuit on January 19, 1996. This petition for certiorari was then filed.

REASONS FOR GRANTING THE PETITION

A. The Circuits Are Split On Whether Eleventh Amendment Immunity Turns On The Legal Liability Of A State Entity Or On A Prediction Of The Likely Financial Impact Of A Particular Judgment.

The Circuits are split on an important constitutional question concerning the Eleventh Amendment. The two sides of this split are represented by the majority and dissenting opinions below: Some circuits follow the rule urged by the dissent — that the immunity of State entities under the Eleventh Amendment should be based solely on the legal liability of the State entity for the judgment. Other circuits follow the approach adopted by the majority — that the immunity of State entities must be based on a prediction of the likely financial impact of a particular judgment on State resources. Under this second view, State entities may lose their Eleventh Amendment immunity to the extent that they have rights to reimbursement from third parties.

This circuit split arises most frequently in the context where, as in this case, the State defendant has a right to reimbursement from the federal government. It was in this context that the split was recognized by Justice White in 1992 as "important." *See Paschal v. Didrickson*, 502 U.S. 1081, 1082 (1992) (White, J., dissenting). Furthermore, the uncertainty engendered by this circuit split is now to the point that even on the most narrow view of issue presented by this case — *i.e.*, whether this particular University may invoke the protection of the Eleventh Amendment for its functions in operating national research laboratories pursuant to federal contract — there is a divergence of circuit authority. *See Mascheroni v. Board of Regents of Univ. of Calif.*, 28 F.3d 1554 (10th Cir. 1994) (sustaining University of California's Eleventh Amendment immunity in employment action arising out of University's management of Los Alamos National

Laboratory, another national laboratory operated by the University pursuant to a DOE contract).⁸

The Seventh Circuit has consistently taken the position urged by the dissent below. In *Cannon v. University of Health Sciences*, 710 F.2d 351 (7th Cir. 1983), the court held that Southern Illinois University (SIU) and the Board of Trustees of the University of Illinois (UI) were entitled to Eleventh Amendment immunity against Cannon's discrimination claims under 42 U.S.C. § 1983. The court first determined that SIU and UI are "recognized as state agencies under Illinois law" and thus are entitled to immunity as a threshold matter. *Id.* at 356. The court rejected the argument that its analysis should be "altered by the possibility that a damage award would be met through insurance proceeds or from federal funds." *Id.* at 357.⁹ Rather, the court adopted the position that "[i]f Cannon's suit would result in a damage award payable by the universities, it is barred by the Eleventh Amendment." *Id.*

The Seventh Circuit's position in *Cannon* is essentially identical to the position urged by Judge Canby below. Both

⁸ The court in *Mascheroni* did not expressly consider the indemnification aspect of the University's agreement with the DOE but, as Justice White noted in his dissent from the denial of certiorari in *Paschal*, see 502 U.S. at 1081, the Tenth Circuit has aligned itself on the side of the circuit split that disregards the source of the state funds in applying the Eleventh Amendment. See *Exparte v. Valdez*, 862 F.2d 788, 794 (10th Cir. 1988); see also *infra*, at pp. 13-14.

⁹ State entities, like SIU and UI, may carry third party insurance because, among other reasons, the State has waived its sovereign immunity in its own courts. Such waivers do not, however, constitute waivers of the State's immunity to suit in federal court under the Eleventh Amendment. See *Anzaadere State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) ("Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment.").

Cannon and this case involved suits against State universities, and in both cases, the plaintiffs alleged that the universities may be able to offset the effects of the judgment with insurance or federal funds. The Seventh Circuit, however, rejected that argument and focused solely on the universities' legal liability as the touchstone for Eleventh Amendment immunity. This mirrors the dissent's position below:

"The fact that California has a legal means of collecting an indemnity from the United States does not affect its primary liability for the judgment. . . . The question is not who pays in the end; it is who is legally obligated to pay the judgment that is being sought. Here it is the State." App. at 13a (Canby, J., dissenting).

The Seventh Circuit reaffirmed this position in *Kroll v. Board of Trustees of University of Illinois*, 934 F.2d 904 (7th Cir. 1991), where it again held that UI was entitled to Eleventh Amendment immunity against § 1983 claims. Kroll contended that potential proceeds from various insurance policies would "comprise a source of income other than the state treasury" and thus abrogate immunity. *Id.* at 908. The court rejected the contention "that the eleventh amendment does not apply unless and until a private party seeks a money judgment payable from the state treasury." *Id.* The court held that a suit against a State agency such as UI must be dismissed unless the suit falls within one of two exceptions -- waiver by the State to suit in federal court, or abrogation of the Eleventh Amendment by Congress.¹⁰ *Id.*

¹⁰ Kroll left open the possibility that, if UI's sources of income from all outside sources rendered UI independent from the public fisc, the institution as a whole may no longer be viewed as part of the State for purposes of the Eleventh Amendment. That possibility is, however, quite different from the Ninth Circuit's ruling. The Ninth Circuit did not rule (continued...)

Because neither of these exceptions existed, the court sustained the immunity claim of the University of Illinois without regard to the possibility of third-party indemnification.

The Seventh Circuit further solidified its position in *Paschal v. Jackson*, 936 F.2d 940 (7th Cir. 1991), *cert. denied*, 502 U.S. 1081 (1992).²⁷ There, the court held that the State was entitled to Eleventh Amendment immunity against the plaintiffs' claims for past unemployment benefits even where the federal government was required to reimburse the State for "the whole award." *Id.* at 943. The court stated that it would "prefer an approach that disregards the source of state funds" because otherwise the courts would have "to engage in a detailed audit of the defendant's finances to determine whether the defendant department or subdivision is indeed 'the state.'" *Id.* at 944. The court's conclusion was identical to that urged by the dissent below: "Where Illinois gets the money to satisfy a judgment is no concern of the plaintiff or the court; what matters is that the judgment runs against the state." *Id.* (quoting *Cosby v. Jackson*, 741 F. Supp. 740, 742 (N.D. Ill. 1990)). Compare App. at 14a (Canby, J., dissenting) (arguing that the University should be held immune "because the judgment sought against it would be a legal liability of the State").

The leading circuit on the other side of the split is the Fourth Circuit. In *Brown v. Porcher*, 660 F.2d 1001 (4th Cir.), *cert.*

²⁷(...continued)

that the University has become so financially independent from the State of California that it should not longer be considered part of the State government for purposes of the Eleventh Amendment. Rather, the majority opinion adopts the position rejected by Kroll and Canby that the University may not be entitled to immunity in particular cases where the University can seek reimbursement from a third party.

²⁷ As noted above, Justice White dissented from the denial of certiorari in *Paschal* on the grounds that there was a conflict among the circuits on an "important" issue. See 502 U.S. at 1082.

denied, 459 U.S. 1150 (1981), the court held that, notwithstanding the Eleventh Amendment, the South Carolina Employment Security Commission — which otherwise would qualify as part of the State for purpose of the Eleventh Amendment — could be sued in federal court for a retroactive award of unemployment benefits. The court there acknowledged that the award against the State Commission could amount to "several million dollars" but nonetheless ruled that the Eleventh Amendment did not apply because the Commission could "recoup, on an actuarial basis, sums that are attributable to the awards." 660 F.2d at 1006. Such recoupment, the court found, could come from employers covered by the unemployment insurance program and from federal contributions. *Id.*; see also *id.* at 1007 (money for unemployment award would come from "employer contributions, federal funding, investment income, and other receipts"). Accordingly, because the State's "general revenues" would be protected from liability, the court held that "a retroactive award against the South Carolina Employment Security Commission does not violate the eleventh amendment." *Id.* at 1007.

Although *Brown v. Porcher* was a case of first impression at the appellate level and thus gave rise to no circuit split, the Fourth Circuit's extraordinary ruling still attracted the attention of three Justices, who believed the Eleventh Amendment issue "significan[t]" and "important." 459 U.S. 1150, 1153 (White, J., joined by Powell and Rehnquist, JJ., dissenting from denial of certiorari).

Other circuits have taken different positions on the basic circuit split. As Justice White noted in dissenting from the denial of certiorari in *Paschal*, the Tenth Circuit shares the position of the Seventh. In *Esparza v. Valdez*, 862 F.2d 788 (10th Cir. 1988), which was cited with favor by *Paschal*, the court held that a state agency had immunity from suit under the Eleventh Amendment even though the judgment would operate only against a fund that would be replenished by federal funding, employer contributions, and other sources. *Id.* at 795. The court rejected the Fourth Circuit's position in *Brown v. Porcher* and held that

"even if we could find little or no fiscal impact on the state from plaintiffs' suits, the financial impact on the state does not appear to be the predominant factor in Eleventh Amendment analysis."⁸ *Id.* Thus, where a judgment would run against a State agency, the suit is barred regardless of the source of the funds to pay the judgment. *Id.*

The Third Circuit has adopted a modified version of the Fourth Circuit's *Brown v. Porcher* position that allows recovery against State defendants *to the extent* that the State would receive federal reimbursement. In *Bennett v. White*, 865 F.2d 1395 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989), the court denied Eleventh Amendment immunity to a State agency where the plaintiffs sought State payments pursuant to an Aid to Families with Dependent Children (AFDC) program. Under AFDC, the federal government reimburses States for "at least 50 percent" of their expenditures under the program. *Id.* at 1398. The court reasoned that, to confer immunity on the State and relieve it from the need to seek reimbursement would confer "an unwanted bonanza upon the United States." *Id.* at 1408. Accordingly, the court ordered an accounting so that the district court could impose retroactive relief against the State Department of Public Welfare "at least to the extent that DPW will be reimbursed by the United

States." *Id.*; see also *Robinson v. Block*, 869 F.2d 202, 214 n.11 (3d Cir. 1989) (same).⁹

The Third Circuit's position in *Bennett* is inconsistent with the First Circuit's ruling in *Fernandez v. Chardon*, 681 F.2d 42, 59-60 (1st Cir. 1982), *aff'd on other grounds sub nom.*, *Chardon v. Fumero Soto*, 462 U.S. 650 (1983). The First Circuit there acknowledged that some early district court cases supported the plaintiffs' argument "that the eleventh amendment proscription does not apply where a state may use federal funds to pay damages." 681 F.2d at 59. The court, however, refused to create an exception to the Eleventh Amendment where the State and federal funds are "intermingled," *id.*, and noted that this Court held in *Florida Dep't of Health & Rehabilitation Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (*per curiam*) that "state participation in federally funded public aid program[s] does not amount to [a] waiver of sovereign immunity." 681 F.2d at 60.

Despite its ruling in *Fernandez*, the First Circuit did create an exception to the Eleventh Amendment in *Foggs v. Block*, 722 F.2d 933 (1st Cir. 1983), *rev'd on other grounds sub nom.*, *Atkins v. Parker*, 472 U.S. 115 (1985). As Justice White noted in his dissent from the denial of certiorari in *Paschal*, see 502 U.S. at 1082, the First Circuit in *Foggs* held that the Eleventh Amendment did not bar a suit against State defendants where the federal government (through its food stamp program) would reimburse the State for *all* (or almost all) of the costs of the judgment. 722 F.2d at 941 n.6. The First Circuit recognized that entering judgment against the State might impose "some administrative costs" on the State, but concluded that the Eleventh

⁸ In a recent Tenth Circuit case, *Lujan v. Regents of University of California*, 69 F.3d 1511, 1522-23 (10th Cir. 1995), the court noted in passing a few of the conflicting authorities (including the Seventh Circuit's ruling in *Kroll*) on the issue whether State entities lose Eleventh Amendment immunity where they may ultimately receive reimbursement from the federal government or other third party. The court, however, did not have to reach the issue in that case. Accordingly, it did not investigate the issue further and did not note its prior ruling in *Esparza* that rejected the Fourth Circuit's *Brown v. Porcher* ruling and held that the Eleventh Amendment protects States even from suits having "little or no fiscal impact" on the State.

⁹ The dilemma of attempting to achieve the result sought by the Third Circuit in a matching fund program illustrates the difficulty of predicated Eleventh Amendment immunity on assumptions as to the impact of a judgment on the state fisc. See section B.2, *infra*.

Amendment should not apply because those costs "should be de minimis." *Id.*¹⁰

More recently, however, the First Circuit has expressed doubt that the Eleventh Amendment permits damage awards against a State treasury where the State may seek reimbursement from the federal government. *See Doucette v. Ives*, 947 F.2d 21, 29 (1st Cir. 1991). The court stated that relying on federal reimbursement as a means around the Eleventh Amendment "seems a problematic argument given the delays and uncertainties likely in the [federal] reimbursement procedure and the fact that, in the meantime, the court's judgment would seemingly have to be satisfied from the state's fisc, thus violating the Eleventh Amendment." *Id.* Nevertheless, the *Doucette* court declined to reach the issue because it determined that the plaintiffs were procedurally defaulted on the argument. *Id.* at 29-30.¹¹

In the context of reimbursement by a private insurer (not the federal government), the First Circuit has held that the determination of Eleventh Amendment immunity should *not* be affected by the fact that the State entity may obtain reimbursement. Like the Seventh Circuit in *Cannon*, which refused to qualify UI's Eleventh Amendment immunity because

¹⁰ The First Circuit's determination in *Foggs* that administrative costs are irrelevant to the Eleventh Amendment analysis is inconsistent with the position of the Sixth Circuit. In *Cotton v. Mansour*, 863 F.2d 1241, 1245-47 (6th Cir. 1988), the court held that the Eleventh Amendment prohibited retroactive relief against a State, even where the federal government would reimburse the State for the entire cost of the judgment, because the State would still shoulder some administrative costs. *See also Colbeth v. Wilson*, 554 F. Supp. 539, 544-46 (D. Vt. 1982) (same), *aff'd*, 707 F.2d 57 (2d Cir. 1983) (*per curiam*).

¹¹ The court decided that, if such a reimbursement exception existed, it would necessitate "a fact-specific inquiry" to determine the precise impact of the judgment on the State. The plaintiffs were procedurally defaulted because they had not developed such a factual record in district court.

the judgment might be satisfied by insurance proceeds, 710 F.2d at 357, the First Circuit in *In re San Juan Dupont Plaza Hotel Fire Litigation*, 888 F.2d 940 (1st Cir. 1989), held that the Tourism Company of Puerto Rico was entitled to Eleventh Amendment immunity even though "any judgment against the Tourism Company would be paid by its insurance carriers."¹² The court determined first that the Tourism Company should be viewed as an instrumentality of Puerto Rico,¹³ and then held that "the fact that any damages might be paid by an insurance carrier does not alter the fact of Eleventh Amendment immunity." *Id.* at 945.¹⁴

The distinction between federal and private reimbursement reveals the unstable nature of the case law generated by trying to predict the ultimate financial impact of a judgment, rather than by determining the legal liability for the judgment. The First Circuit in *San Juan Dupont Plaza* reasoned that allowing federal

¹² The Commonwealth of Puerto Rico is treated as a State for purposes of determining Eleventh Amendment immunity. *See Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694, 697 (1st Cir. 1983).

¹³ To determine whether the Tourism Company should be viewed as an instrumentality of Puerto Rico, the court examined the structural and financial relationship between the Company and the government. Thus, for example, the court relied on the facts that the entire board of directors is appointed by the Governor of Puerto Rico, *see San Juan Dupont Plaza*, 888 F.2d at 944, that the Company "performs a vital governmental function in promoting the tourism industry and supervising gambling in the casinos in Puerto Rico," *id.* (quoting district court findings), and that much of the money available to the Company was provided by the taxpayers of the Commonwealth, *see id.* at 943-44.

¹⁴ In reaching its decision, the First Circuit relied on the Ninth Circuit decision, cited in Judge Canby's dissent below, of *Markowitz v. United States*, 650 F.2d 205 (9th Cir. 1981), which also held that private insurance does not defeat a State's Eleventh Amendment immunity. *See* 650 F.2d at 206. Thus, both the First and Ninth Circuits distinguish between federal reimbursement and reimbursement by private insurers.

judgments to run against insured State entities would "contravene the purpose of the Eleventh Amendment" because "they would be forced to pay higher premiums for their insurance." *Id.* But the prediction of higher premiums is unfounded speculation given that the Court was considering only immunity from suit *in federal court*. As the court noted, the State entity was subject to suit in state court pursuant the "sue and be sued" provision in its statutory corporate charter.¹⁵ *Id.* at 944-45; *See also Florida Nursing Home Assn.*, 450 U.S. at 149-50 (sue-and-be-sued clause authorizes suits in State, but not federal, courts). The First Circuit had no reason to believe that insurers would charge higher premiums based on the forum in which the entity could be sued, even though the same substantive law would be applied in both fora. The contrast between the First Circuit's decisions in *San Juan Dupont Plaza* and *Foggs* demonstrates further contradictions and inconsistencies generated in this area of law by courts that base Eleventh Amendment immunity on a prediction of the ultimate financial impact of a particular judgment.

Finally, the Fifth Circuit in *Cronen v. Texas Dep't of Human Services*, 977 F.2d 934, 938 (5th Cir. 1992), rejected the argument that a State or State agency could be sued if the federal government would ultimately bear the entire cost of the judgment.¹⁶ Based on its reading of this Court's decisions, the court concluded that "the source of the damages is irrelevant when the suit is against the state itself or a state agency." *Id.*

¹⁵ The same was true in *Markowitz*: Sovereign immunity has been waived in State courts, so the Eleventh Amendment issue would determine only the forum of the suit. *See* 650 F.2d at 206.

¹⁶ The Fifth Circuit incorrectly aligned the Seventh Circuit with the Third Circuit on the basis of *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973). Not only does *Jordan* fail to address the federal reimbursement point, but the court's Eleventh Amendment holding was reversed on appeal by this Court in *Edelman v. Jordan*, 415 U.S. 651 (1974). The Fifth Circuit failed to note that more recent Seventh Circuit cases have squarely rejected a reimbursement exception to the Eleventh Amendment.

The different approaches by the circuits have now led to a split on the precise factual situation involved in this case. In *Mascheroni v. Board of Regents of Univ. of Calif.*, 28 F.3d 1554 (10th Cir. 1994), another plaintiff sued the University of California over an employment matter at another national laboratory (Los Alamos National Laboratory) that the University operates under a like contract with the DOE. The Tenth Circuit, however, dismissed that action on Eleventh Amendment grounds. Consistent with the Tenth Circuit view expressed in *Esparza*, the court in *Mascheroni* did not concern itself with what funds the University would use to satisfy the particular judgment against it.¹⁷ *See Esparza*, 862 F.2d at 795 ("even if we could find little or no fiscal impact on the state from plaintiffs' suits, the financial impact on the state does not appear to be the predominant factor in Eleventh Amendment analysis"). Because the University is a branch of State government, the court ruled that the plaintiff could not proceed unless he could prove either that the State waived its immunity, or that Congress abrogated the immunity for the State. *Id.* at 795-96. That two cases arising out of nearly identical circumstances can be treated so differently demonstrates the absence of uniform principles of law on this important issue.

Finally, in addition to the conflicting circuit authority on this issue, there are a number of conflicting district court cases. These

¹⁷ The Eleventh Amendment was raised *sua sponte* by the court of appeals in *Mascheroni*. (The University won a motion to dismiss in the district court on different grounds (*i.e.*, statute of limitations).) The court's opinion does not specifically address the intricacies of the University-DOE contract but, given its ruling in *Esparza*, the court had no need to investigate the financial impact of the judgment. *Mascheroni* points up an important procedural point: If the Eleventh Amendment immunity is to remain a *jurisdictional* doctrine, the test for determining its application must remain capable of being decided in the preliminary stages of litigation and by a court *sua sponte* if necessary. A test that focuses on the financial impact of the judgment will, however, demand discovery and a fact-intensive inquiry in many cases. *See* section B.2, *infra*.

additional cases further demonstrate that this issue arises regularly and warrants the attention of this Court.^{18/}

In sum, there is a significant split in authority whether State entities retain their Eleventh Amendment immunity notwithstanding reimbursement or indemnification arrangements. The Seventh, Fifth and Tenth Circuits take a position consistent with the dissent's position below; they afford Eleventh Amendment immunity to State entities where the State entity is legally liable for the judgment and disregard whether the State may be able to recoup its losses from some third party. In contrast, the Third and Fourth Circuits hold that the possibility of reimbursement vitiates Eleventh Amendment immunity, even though the State defendant remains legally liable. The First and now Ninth Circuits seem to take a slightly different position — that the possibility of reimbursement by the *federal government*, but not by a private insurer — vitiates the Eleventh Amendment immunity that a State defendant would otherwise possess.

^{18/} See, e.g., *McGuire v. Switzer*, 734 F. Supp. 99, 106-07 (S.D.N.Y. 1990) (refusing to create exception to Eleventh Amendment for possibility of future federal reimbursement, at least where federal government's liability has not previously been adjudicated under binding case law); *Temple University v. White*, 729 F. Supp. 1093, 1101 (E.D. Pa. 1990) (following Third Circuit decision in *Bennett* and ruling that plaintiff is entitled to retroactive relief against State defendants to the extent that they can "recapture . . . additional sums from the federal treasury retroactively"); *Dunlop v. Minnesota*, 626 F. Supp. 1127, 1130 (D. Minn. 1986) (refusing to recognize "federal reimbursement" as an exception to Eleventh Amendment immunity where State had a right under regulations to federal reimbursement for certain claims of plaintiffs); *County Dep't of Public Welfare v. Stanton*, 545 F. Supp. 239, 243 n.3 (N.D. Ind. 1982) (refusing to order State to release federal reimbursement funds because of Eleventh Amendment); *Harrington v. Blum*, 483 F. Supp. 1015, 1021-22 (S.D.N.Y. 1979), aff'd without op., 639 F.2d 768 (2d Cir. 1980) (holding that the Eleventh Amendment did not bar a suit for food stamp benefits because the State could appropriately seek federal reimbursement for any liability).

The University strongly supports the position of the Seventh, Fifth and Tenth Circuits and the dissent below. Indemnity and reimbursement agreements should not affect whether a State or one of its component entities is amenable to federal court jurisdiction. Such agreements are arrangements between the State and a third party (frequently, as in this case, between the State and the federal government); they do not alter the fundamental fact that a federal court's judgment will be legally enforceable against only the State or the State component, not the third party. Moreover, the position adopted by the majority below represents a significant infringement on State sovereign immunity and a substantial practical burden. But regardless which position is correct, the result should not vary from circuit to circuit, as is currently the case.

B. The Issue Presented Here Is Important Because The Position Adopted By the Majority Below Significantly Infringes Upon State Sovereign Immunity and Imposes Heavy Practical Burdens.

1. The Inconsistency With This Court's Decisions.

As explained above, the issue presented by this petition warrants the attention of this Court because it arises frequently and has divided the circuits. But the issue also has important implications for maintaining the integrity of State Eleventh Amendment immunity, as defined by this Court's prior cases.

The rule adopted by the majority below, and by the First, Third and Fourth Circuits, distorts the purpose of State Eleventh Amendment immunity. Such immunity is *not* just about protecting States from the ultimate financial impact of suits; it is more generally concerned with protecting the States from having to appear and defend suits in the federal courts, regardless of the financial impact of the particular suit. As this Court recently stated, "[t]he Eleventh Amendment does not exist solely in order to 'preven[t] federal court judgments that must be paid out of a State's treasury,' . . . ; it also serves to avoid the indignity of

subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Seminole Tribe of Florida v. Florida*, 116 S.Ct. ___, ___ (slip op. at 12-13) (March 27, 1996) (citations omitted). Accordingly, this Court has "often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." *Id.*, 116 S.Ct. at ___ (slip op. at 12); *see also Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).¹⁹

As this Court has repeatedly held, "[a] State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (footnote omitted). Thus, it is black letter law that a State's general waiver of sovereign immunity does not constitute a waiver of Eleventh Amendment immunity to suit in federal court. *See Florida Nursing Home Assn.*, 450 U.S. at 150; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985). This approach to Eleventh Amendment immunity makes little sense if the immunity is concerned only with the financial impact of the suit. Once a State has consented to suit in its own courts, suit in federal court should not lead to any more financial impact on the State than suit in State courts, given that the same substantive law must be applied in both fora.

Nonetheless, States waiving sovereign immunity remain immune from suit in federal court, because the Eleventh Amendment encompasses not a substantive immunity but a *jurisdictional* rule that protects the State's dignitary interests in

being held accountable only in courts of its own creation. *See Seminole Tribe of Florida*, 116 S. Ct. at ___ (slip op. at 12-13) (noting the States' dignitary interests); *Pennhurst*, 465 U.S. at 100 (Eleventh Amendment doctrine is grounded in the "problems of federalism inherent in making one sovereign appear against its will in the courts of the other"). Indeed, precisely because the Eleventh Amendment embodies a threshold jurisdictional rule, this Court held in *Puerto Rico Aqueduct* that a State or State entity may appeal a denial of immunity immediately under the collateral order doctrine. *See* 506 U.S. at 146-47.

The importance of States' dignitary interests in being immune from federal court jurisdiction is also confirmed by this Court's analysis in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994). There, the Court considered the States' dignitary interests and the accompanying federalism concerns *first* in its analysis. The Court initially satisfied itself that "[b]ystate entities occupy a significantly different position in our federal system than do States themselves," 115 S. Ct. at 400, and that "[s]uit in federal court is not an affront to the dignity of a Compact Clause entity" nor a threat to "the integrity of the compacting States," *id.* at 401. *See also id.* at 404 (recognizing first step in analysis was determining that it is not "disrespectful to one State to call upon the Compact Clause entity to answer complaints in federal court").²⁰ Only after it had decided that Compact Clause entities are separate and different from the States which form them did the Court consider "the vulnerability of the State's purse" (*id.*

¹⁹ Given this Court's holding in *Seminole Tribe of Florida* that the relief sought is irrelevant to Eleventh Amendment analysis, we believe that the Court could appropriately reverse the decision of the Ninth Circuit below on summary action. Our claim to summary reversal is supported by *Florida Nursing Home Assn.*, where this Court also took summary action to correct a court holding that was inconsistent with the approach taken in this Court's previous decisions.

²⁰ As *Hess* and another prior case recognized, *see* 115 S. Ct. at 401-02; *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400 (1979), Compact Clause entities — formed by two or more States and unaccountable to people of any one State — cannot fit comfortably into the text of the Eleventh Amendment, which provides immunity in suits against "one of the United States." Obviously, that important textual consideration supports immunity in this case, as the University was created as a governmental department by the California constitution, and it is accountable only to the people of that State.

at 404) as a factor in determining whether the Compact Clause entity was entitled to Eleventh Amendment protection.

A view that a State entity loses Eleventh Amendment immunity where the financial impact of the suit might be ultimately softened by third party indemnity also conflicts with the classic formulation of what suits implicate sovereign immunity:

The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.

Pennhurst, 465 U.S. at 101 n.11 (internal quotations omitted; quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)). As this formulation shows, suits implicate sovereign immunity in many circumstances besides those where a judgment would expend itself against the treasury. Thus, a suit against a government agency to compel it to take a certain course of action — even action that may have few fiscal effects — is barred by sovereign immunity absent a waiver.^{21/}

^{21/} In some circumstances, a plaintiff seeking only to compel a State to follow a particular course of action may avoid sovereign immunity by suing for injunctive relief against a State officer. See *Ex parte Young*, 209 U.S. 123 (1908). That tactic is not available, however, unless the plaintiff is asserting a federal right, see *Pennhurst*, *supra*, and the relief sought can fairly be characterized as a prospective remedy for continuing violation of law, not a retroactive remedy for a past harm, see *Edelman v. Jordan*, 415 U.S. 651 (1973), and *Papasan v. Allain*, 478 U.S. 265, 279-81 (1986). In this case, the Court would not have to address the scope of the *Ex parte Young* doctrine because the ruling below was based entirely on the majority's holding that the University was not protected by the Eleventh Amendment "in this particular instance." App. at 10a. We note in (continued...)

Furthermore, the classic formulation on sovereign immunity also demonstrates that the approach of Ninth, Fourth and Third Circuits focuses on the wrong issue: The issue is not whether the lawsuit *might* ultimately have a revenue-neutral effect on the "public treasury or domain" due to some offsetting claim of the State; the issue is whether the judgment itself would operate on the public domain. Here, there is no dispute that the plaintiff is seeking a judgment for money damages and reinstatement that would run against the University (which, under State law, is clearly part of the public domain). The federal government's reimbursement arrangement with the University does not alter this fact, as the judgment would not operate against federal government, but against the University. Furthermore, there is no legal certainty that federal government will, in fact, reimburse the University, given the qualifications that attach to the indemnification clause of the University's contract with DOE, including the need for continuing federal appropriations, *see supra*, at p. 4.^{22/}

Finally, the position taken by the Ninth, Fourth and Third Circuits contradicts this Court's teaching in *Pennhurst* that "[i]t is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment . . .

^{21/}(...continued)

passing, however, that, if this Court reverses and holds that the University is entitled to Eleventh Amendment protection, Doe will not be able to bring his suit under the *Ex parte Young* doctrine. Doe's contract claims for damages and reinstatement would be barred by *Pennhurst* because those are state law claims, and Doe's § 1983 claims would be barred by *Edelman* and *Papasan*.

^{22/} While the University does have a right to seek reimbursement from the federal government for the cost of any judgment, the plaintiff's suit is about more than just money: He is also seeking reinstatement under his breach of contract claim and, if he is successful in that claim, it will be the State, not the federal government, that will be ordered to employ him.

regardless of the nature of the relief sought." 465 U.S. at 100. Under the approach represented below, a State entity like the University — which is a constitutional branch of the California government coordinate with the legislative, executive and judicial branches — may be brought before a federal tribunal in a case for money damages, provided there is a prediction that the relief sought may ultimately not have too bad an effect on the State fisc. This is a major qualification of the immunity due components of State government, and it is not in accord with this Court's approach to the Eleventh Amendment.²³

2. The Practical Implications of the Ruling Below.

The importance of the issues presented in this case are highlighted by considering how the different approaches of the circuits apply in actual litigation. The position adopted by the Seventh, Fifth and Tenth Circuits, and argued by the dissent below, allows the Eleventh Amendment immunity of State entities to function like a true *immunity* from suit: If the State entity is sued in federal court, the entity can file a motion to dismiss, and the court can evaluate the claim of immunity as a matter of law. Where the defendant entity has previously been determined, under controlling circuit authority, to be part of the State, the case is dismissed. Where that determination has not yet been made, then the courts will have to evaluate whether the defendant entity is part of the State government. That determination, however, will not be specific to the facts of any one case and, once made, should be binding in all future cases, provided there is no change

²³ Diversity cases such as this case present an Eleventh Amendment problem even for those Justices that subscribe to the view that the Eleventh Amendment merely immunizes States against actions premised on diversity jurisdiction. See *Atascadero*, 473 U.S. at 247 (Brennan, J., dissenting); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989) (Stevens, J., concurring); *Seminole Tribe of Florida*, 116 S. Ct. at ____ (Souter, J., dissenting) (slip op. at 11-12). Even under that limited view of the Amendment, courts must still determine whether a suit is in fact against the State and therefore outside of federal diversity jurisdiction.

in the entity's basic position within the State government. See App. at 12a (Canby, J., dissenting) ("Once we have decided that the University is an arm of the Government of California for Eleventh Amendment purposes, the role that these structural factors play [in determining immunity] should be put to rest.").

But the rule adopted by the majority below — that a State entity may lose its Eleventh Amendment immunity depending on a prediction of the ultimate financial impact of the suit — provides no true immunity from suit. A plaintiff will frequently, perhaps always, be able to hale any State entity into federal court and demand burdensome discovery on the entity's finances and on the likely financial impact of any particular suit. To maintain its Eleventh Amendment immunity, a State entity will then have to go through a fact-intensive mini-trial where the district court will, prior to trial on the merits, try to predict the ultimate financial impact of a particular suit. All State entities will be subject to this sort of burdensome mini-trial, even entities (such as the University here) that many courts have previously held to be a part of the State for Eleventh Amendment purposes, and the inquiry will involve highly sensitive matters of the entity's internal finances and its financial arrangements with third parties.

The problems with this latter approach were recognized by Judge Canby below, who warned that the majority's approach to determining Eleventh Amendment immunity raises the specter of "a judicial exercise that has no natural boundary." App. at 14a (Canby, J., dissenting). As Judge Canby noted:

In deciding the threshold question of Eleventh Amendment immunity, we can determine from the pleadings before us and the state statutes whether the judgment that is sought would run against the State. It is far more difficult to determine whether the State, after such a judgment was rendered against it, would have rights of action against third parties that might lead it eventually to recoup the judgment. In

this case, there is a relatively clear indemnity agreement, but does the United States have any defenses to a claim of indemnity? In the next case the State might not have the benefit of an indemnity agreement, but might have a common-law cause of action against a third party. Must we assess the State's likelihood of success in order to decide the Eleventh Amendment question?

Id. Judge Canby aptly depicts a range of possible complications bound to arise in pretrial proceedings that attempt to determine the ultimate financial impact of a particular suit.^{24/} If State entities can always be subjected to such proceedings, they have no real immunity from suit in federal court.

Nor is Judge Canby alone in his assessment of the burdens presented by tying Eleventh Amendment immunity to a prediction of the ultimate financial impact of the judgment. In *Paschal*, for example, the Seventh Circuit rejected the Fourth Circuit's *Brown v. Porcher* position because, *inter alia*, it would require courts "to engage in a detailed audit of the defendant's finances to determine whether the defendant department or subdivision is indeed 'the state.'" 936 F.2d at 944. And in *Doucette*, 947 F.2d at 29, the First Circuit noted that, in Circuits where a reimbursement exception to Eleventh Amendment has been recognized, district courts actually do have to conduct "a fact-specific inquiry" concerning the impact of judgment. Such factual inquiries are inconsistent with the basic purpose of the Eleventh Amendment, which is to provide a threshold immunity from suit. *See Puerto Rico Aqueduct*, 506 U.S. at 147 (finding "little basis" to distinguish between the State and State entities because the

adjudication of Eleventh Amendment immunity should not "implicate[] any extraordinary factual difficulty").

To the extent that federal courts must make fact-intensive determinations concerning sources of funding for judgments against State entities, the courts can become entangled in a web of ancillary issues. Not only does this burden the federal courts, but it also imposes the prospect of continual litigation for State entities, because the ruling in one case that an entity is an arm of the State would never be *stare decisis* in the next case.

But an even worse procedural problem with the majority ruling below is presented by the limitations of *res judicata*: While a court may hold in the primary liability case that the State *should be* reimbursed by the federal government (or a private insurer), that ruling provides no guarantee to the State entity that it *will be* reimbursed. The ruling is clearly not binding on the federal government or on any other third party not represented in this case. Thus, the court's ruling below is merely a prediction of the likely financial impact of the suit, but it provides no certainty for the State. Even in this case, DOE's contractual obligation to indemnify the University is limited by a number of qualifications, the scope of which may be disputed by the government, and the obligation is also subject in its entirety to "the availability of funds appropriated from time to time by Congress." App. at 36a (Contract, Art. XVII, cl. 4(d)).

Granting certiorari in this case affords the Court an opportunity not only to resolve the circuit split identified above, but also to address an important issue of Eleventh Amendment immunity frequently confronted by the lower courts.

^{24/} In addition, an award of damages against the University could affect future University-DOE contracts. This is a very real, if immeasurable, consequence that demonstrates why Eleventh Amendment immunity should not turn on predictions of which entity will bear the cost of a judgment.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

- Respectfully submitted,

James E. Holst
James Nellis Odell
Patrick J. O'Hern
**OFFICE OF THE GENERAL
COUNSEL, UNIVERSITY
OF CALIFORNIA**
300 Lakeside Drive
Oakland, CA 94612-3565

Charles A. Miller*
John F. Duffy
Caroline M. Brown
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioners

April 17, 1996

*Counsel of Record